Office - Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2035

IN THE

Supreme Court of the United States

October Term, 1980

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,
Petitioner,

v.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN, THE GOVERNMENT OF IRAN, DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT BEFORE JUDGMENT

Thomas W. Luce, III
Counsel of Record
M. David Bryant, Jr.
Eugene Zemp DuBose
HUGHES & HILL
1000 Mercantile Dallas Building
Dallas, Texas 75201
(214) 651-0477
Attorneys for Petitioner Electronic Data Systems Corporation Iran

OF COUNSEL:
Monroe Leigh
Michael Sandler
STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D. C. 20036
(202) 862-2000

Question Presented

Can the Executive constitutionally divest the federal courts of Congressionally-conferred jurisdiction; nullify a final judgment of the federal courts; and nullify attachments ordered by the federal courts?

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Regulations Involved	3
Introductory Statement	4
Statement of the Case	6
Reasons for Granting the Writ	10
Conclusion	24
Appendix to Petition	Separate Volume

Table of Authorities

CASES	PAGE
American International Group, Inc. v. Islamic Republic of Iran, No. 79-3298 (D.C. Cir. May 22, 1981)	13, 20
Chas. T. Main Int'l Inc. v. United States, No. 81-315-C (D. Mass. March 17, 1981), aff'd, No. 81-1187 (1st Cir. May 22, 1981)	12
Chas. T. Main Int'l Inc. v. United States, No. 81-1187 (1st Cir. May 22, 1981)	6, 15, 17, 18, 19, 20, 23
Dresser, Inc. v. The Islamic Republic of Iran, No. CA-80-1535-H (N.D. Tex. May 21, 1981)	20
Narenji v. Civiletti, 481 F. Supp. 1132, 1141 n. 7 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957, (1980)	14
Security Pacific National Bank v. The Government and State of Iran, Nos. CV 79-4661-RJK (Gx), CV 79-4875-RJK (Px), CV 80 0524-RJK (Kx), (C.D. Cal. April 30, 1981)	15, 17, 20
The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	21
Unidyne Corp. v. Government of Iran, No. 80-1029-A (E.D. Va. March 30, 1981)	17, 19
United States v. Belmont, 301 U.S. 324 (1937)	22
United States v. Pink, 315 U.S. 203 (1942)	21, 22, 23
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)	12, 19
Worthy v. Herter, 270 F.2d 905, 910 (D.C. Cir.) *cert. denied*, 361 U.S. 918 (1959)	14
Zweibon v. Mitchell, 516 F.2d 594, 620 (D.C. Cir. 1974) (en banc), *cert. denied*, 425 U.S. 944 (1976)	23

Table of Authorities — (Continued)

PAGE

CONSTITUTIONS, STATUTES, AND RULES

U.S. Constitution

Art. I §§ 1, 8 ..... 3, A-91

Art. II § 2 ..... 3, A-91

Art. III §§ 1, 2 ..... 3, A-92

Art. VI 3, A-92

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* 2, 3, 6, 8, 9, 16, 17, 18, A-93

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* 3, 7, 9, 14, 15, 18, A-105

3 U.S.C. § 301 ..... 3, 14, A-111

22 U.S.C. §§ 1641d, 1641l 22

22 U.S.C. § 1732 ..... 3, 14, A-112

28 U.S.C. § 1252 ..... 2, 3, 5, 10, A-113

28 U.S.C. § 1254(1) 3, 4, 5, A-114

28 U.S.C. § 1292(a)(1) 2

28 U.S.C. § 1331 ..... 3, A-115

28 U.S.C. § 1651 ..... 3, A-116

28 U.S.C. §§ 2201 *et seq.* 3, A-117

50 U.S.C. § 1631 ..... 3, 14, A-118

Trading with the Enemy Act, 50 U.S.C. App. §§ 5, 9 ..... 14, 15

Texas Revised Civil Statutes Article 3827a 3, A-119

Federal Rules of Civil Procedure Rule 69 ..... 3, A-120

Table of Authorities — (Continued)

PAGE

EXECUTIVE ORDERS, REGULATIONS, AND EXECUTIVE AGREEMENTS

Executive Order 12279 ..... 3, 8, 9, 10, A-121

Executive Order 12294 ..... 3, 10, 15, A-124

Iranian Asset Control Regulations, 31 C.F.R. Part 535

31 C.F.R. § 535.213 (46 Fed. Reg. 26477) 3, 10, A-127

31 C.F.R. § 313.218 (46 Fed. Reg. 14334 as amended by 46 Fed. Reg. 36477) 3, 10, A-127

31 C.F.R. § 535.219 (46 Fed. Reg. 14334) 3, 9, 20, A-129

31 C.F.R. § 535.221 (46 Fed. Reg. 13335) 3, 5, 13, A-129

31 C.F.R. § 535.222 (46 Fed. Reg. 14335) 3, 10, A-131

Declaration of the Government of the Democratic and Popular Republic of Algeria 3, A-137

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran 3, A-142

MISCELLANEOUS

122 Cong. Rec. 33532 (Sept. 29, 1976) (Rep. Danielson) 16

Hearing on H.R. 3483 before the House Comm. on the Judiciary, Subcommission Claims & Gov. Rel., 93rd Cong., 1st Sess. at 38 (June 7, 1973) 16

Table of Authorities — (Continued)

PAGE

MISCELLANEOUS — (Continued)

Hearings on H.R. 11315 before the House Comm. on Judiciary, Subcomm. on Admin. Laws and Govt. Rels., June 2 and 4, 1976 16

H.R. Rep. No. 624, 84th Cong., 1st Sess. (1955), reprinted in [1955] U.S. Code Cong. & Ad. News 2745, 2747 22

H.R. Rep. No. 94-1487, 93rd Cong., 2d Sess. 7 (1976) 16, 17, 18

H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) 14

Markup of H.R. 7738 Before the House Committee on International Relations, 95th Cong., 1st Sess 4 (1977) 15

NO. .....

IN THE

Supreme Court of the United States

October Term, 1980

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,

Petitioner,

v.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN, THE GOVERNMENT OF IRAN, DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT BEFORE JUDGMENT

Opinions Below

The United States District Court for the Northern District of Texas issued its Final Judgment and the Order on which it was based on May 9, 1980. That Order and Judgment are unreported and are set out in the Appendix to this Petition (the "Appendix") at A-37 and A-55, respectively.

That District Court issued its Memorandum Opinion and Preliminary Injunction in a supplementary proceeding in aid

of that Final Judgment on February 12, 1981. They are reported at 508 F. Supp. 1350 (N.D. Tex. 1981), and are set out in the Appendix at A-1 and A-35, respectively.

Jurisdiction

The decrees of the District Court sought to be reviewed are the Final Judgment dated and entered on May 9, 1980, which Defendants contend was nullified by the Executive Orders and Regulations, discussed below, and the Preliminary Injunction dated and entered on February 12, 1981, which, *inter alia*, prevented nullification of the Final Judgment and the Order of Attachment hereinafter described.

On June 5, 1980, The Social Security Organization of The Government of Iran, The Ministry of Health and Welfare of The Government of Iran and The Government of Iran, (the "Iranian Defendants") filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment. The Record on Appeal was docketed in the Court of Appeals for the Fifth Circuit on June 18, 1980.

On March 24, 1981, Donald T. Regan, the Secretary of the Treasury of the United States of America and the United States of America (the "Federal Defendants") filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit from the Preliminary Injunction.[1] The Record

[1]On March 31, 1981, EDS served a motion to dismiss the appeal of the Federal Defendants for lack of jurisdiction. The Fifth Circuit lacks jurisdiction because, since the United States and one of its officers were parties to the supplemental proceeding, in which the preliminary injunction was issued and where the District Court had held the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*, unconstitutional, there was direct review in this Court available under 28 U.S.C. § 1252. Appeal to this Court under § 1252 is exclusive. 28 U.S.C. § 1292(a)(1). The Fifth Circuit did not decide that motion but consolidated the motion and the Federal Defendants' appeal with the Iranian Defendants' appeal on the merits of the Final Judgment.

on Appeal was docketed in the Court of Appeals for the Fifth Circuit on March 30, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 18 of the Rules of this Court.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the following constitutional provisions, statutes, executive agreements, executive orders, and regulations: U.S. Constitution Art. I §§ 1, 8, Art. II § 2, Art. III §§ 1, 2, and Art. VI; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*; 3 U.S.C. § 301; 22 U.S.C. § 1732; 28 U.S.C. §§ 1252, 1254(1), 1331, 1651, 2201-02; 50 U.S.C. § 1631; Texas Revised Civil Statutes Article 3827a; Federal Rules of Civil Procedure Rule 69; Executive Orders 12279, 12294; Iranian Assets Control Regulations, 31 C.F.R. Part 535: 31 C.F.R. § 535.213 (46 Fed. Reg. 26477), 31 C.F.R. § 535.218 (46 Fed. Reg. 14334, as amended by 46 Fed. Reg. 26477), 31 C.F.R. § 535.219 (46 Fed. Reg. 14334), 31 C.F.R. § 535.221 (46 Fed. Reg. 14335), 31 C.F.R. § 535.222 (46 Fed. Reg. 14335); the Declaration of the Government of the Democratic and Popular Republic of Algeria (the "Declaration"), and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (the "Claims Declaration"). The pertinent texts of the foregoing are set forth in the Appendix.

Introductory Statement

Petitioner Electronic Data Systems Corporation Iran ("EDS")[2] respectfully petitions this Court for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit, prior to judgment, pursuant to 28 U.S.C. § 1254(1) and Rule 18 of the Rules of this Court, in order that a question of extraordinary national importance — the constitutionality of the Executive Orders and Regulations issued in connection with the Iranian claims litigation — may be expeditiously resolved at the sole authoritative level: in this Court.

That Executive action — which, as the District Court found on EDS's motion for a preliminary injunction, unconstitutionally impinges on the powers of both the Legislative and Judicial Branches — presents one of the most serious questions as to the allocation of powers among the branches of our tripartite form of Government ever to be submitted to this Court. The constitutional questions involved are, as noted below, completely novel. Neither this Court nor, until the promulgation of the Executive Orders and Regulations, any other Court has adjudicated the issues here involved — notably, because no Executive has ever before sought to exercise such powers.

The need for urgent determination is overwhelming. The Executive purposes, on or before July 19, 1981, to transfer to Iran some $4 billion in funds which have been subject to federal court orders of attachment — an irreversible action which would divest this Court of effective jurisdiction and render academic any subsequent determination that the Executive was without authority so to act. Further, American claimants must, on or before January 19, 1982, make a bind-

[2]The parent of EDS is E.D.S. World Corporation, whose parent is Electronic Data Systems Corporation.

ing election whether to file a claim in the proposed arbitration or pursue their remedies in the federal Courts pursuant to the jurisdiction conferred by Congress as to just such claims. If a claim is filed in the arbitration, however, the Claims Declaration provides that it would thereafter be "excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court." Until this Court has spoken as to the constitutionality of the Executive's attempted divestment of the federal courts' jurisdiction over such claims, no claimant can determine whether to file a claim.

Defendants can hardly question the necessity for immediate resolution of these issues by this Court. The Government, in formally promulgated regulations, has stated that it will not compel transfer of funds until there has been a "definitive legal ruling." 31 C.F.R. § 535.221(b). In early May, the Government wrote letters, urging expedited decision no later than May 31, to three Courts of Appeals in which Iranian matters were pending—but, notably, not to the Fifth Circuit, in which this case is pending.[3] Those letters stated unequivocally that a "dispositive" resolution was required prior to July 19, 1981 and noted that the Government was considering invoking the precise procedure here sought — petitioning for a Writ of Certiorari prior to judgment, pursuant to Section 1254(1).

Such a "definitive" determination can plainly come only from this Court. The questions raised here already have

[3]Despite the Government's insistence on the need for an urgent definitive ruling, it has gone to great lengths to keep this particular case from coming before this Court. A direct appeal lay to this Court, under 28 U.S.C. § 1252, from the District Court's grant of preliminary injunctive relief, entered in February 12, 1981. Instead of taking that appeal, which would have squarely presented the constitutional issues to this Court long before this, the Government permitted the time for such appeal to expire, purporting instead to appeal, improperly, to the Fifth Circuit. *See* n. 1, *supra*.

resulted in sharply divergent decisions in the lower federal Courts. Even where the constitutionality of the Executive action has been upheld, the decisions are in conflict, the majority opinion of the First Circuit in *Chas. T. Main Int'l, Inc. v. United States*, Civil Action No. 81-1187 (1st Cir. May 22, 1981), for example, finding no sufficient statutory authority for the Executive's suspension of claims, basing its conclusion instead on general Article II powers; others relying on purported statutory authority, with the concurring judge in *Chas. T. Main Int'l* specifically questioning the existence of inherent constitutional powers for such Executive action.

Unless this Court acts to enunciate the law, and does so now, perhaps the most important constitutional question in many decades will have been passed by default — and in a state of judicial indecision, where it is impossible to ascertain whether the supposed authority for the Executive action lies in prior Congressional enactment, whether the Executive action is devoid of such statutory authority but is nonetheless salvaged by general Article II powers — or whether the Executive action is utterly without authority, statutory or constitutional. It is respectfully submitted that, whatever the exigencies of the situation that led to the Executive action, its constitutionality *vel non* must be determined authoritatively — and only this Court can do it.

Statement of the Case

Over eight months before Iranian militants seized American hostages in Teheran, EDS commenced a suit for breach of contract under the Foreign Sovereign Immunities Act ("FSIA") in the United States District Court for the Northern District of Texas. Following a two-week trial, the District Court entered its final judgment in favor of EDS

for $19,069,530 plus interest and costs (the "Final Judgment"). The Iranian Defendants perfected an appeal of the Final Judgment to the United States Court of Appeals for the Fifth Circuit.[4]

That Final Judgment was secured by a pre-judgment order of attachment (the "Order of Attachment") entered in the United States District Court for the Southern District of New York on June 13, 1979, which order directed the attachment of some $20 million in funds of the Defendant The Government of Iran. Thereafter, the District Court formally took custody of the funds through the United States Marshal. Five months after the entry of the Order of Attachment, the President, in response to the imprisonment of the hostages in Iran, instituted a "freeze" of Iranian assets under the International Emergency Economic Powers Act ("IEEPA").

In January, 1981 the Executive adhered to two "declarations" of Algeria. The Declaration, *inter alia*, provided, within the context of the general purposes of the Declaration, for the transfer of Iranian bank deposits and securities in the United States to the Central Bank of Algeria by July 19, 1981, and for termination of litigation and nullification of attachments.

The claims procedures, set out in the Claims Declaration, state that certain claims of United States nationals against Iran, which Iran has not settled, are remitted to binding arbitration and that the final deadline for filing claims is

---

[4]The Iranian Defendants were denied a stay of execution of the Final Judgment by both the Court of Appeals and the District Court. The Iranian Defendants chose not to post a supersedeas bond, and the District Court's Final Judgment is now fully enforceable, as it was fully enforceable at the time of the Declarations, discussed, *infra*.

the later of either January 19, 1982, or six months after the appointment of the President of the Claims Tribunal, an event which has not yet taken place.

In connection therewith on January 19, 1981, President Carter signed Executive Order 12279, which directs any bank "in possession of funds or securities legally or beneficially owned" by Iran to transfer those assets to the Federal Reserve Bank of New York, and bans "[a]ll persons subject to the jurisdiction of the United States [from] . . . exercising any right, power, or privilege whether by court order or otherwise," with respect to certain properties which properties the Federal Defendants have consistently maintained include the funds subject to EDS's Order of Attachment.

On January 23, 1981, EDS filed a supplementary proceeding in aid of its Final Judgment (the "Supplementary Proceeding") in the United States District Court for the Northern District of Texas against the Federal Defendants seeking declaratory and injunctive relief against such Defendants to protect the effectiveness of its Final Judgment and its Order of Attachment.

On February 12, 1981, the District Court issued a Preliminary Injunction restraining the Federal Defendants from interfering in any way with the Final Judgment, the Order of Attachment or the funds subject to that Order of Attachment. The District Court held that the Executive's attempt to nullify EDS's Final Judgment and Order of Attachment was unconstitutional; the Executive, it found, had no authority "to negate or countermand valid orders of Article III Courts issued pursuant to an express Congressional grant of jurisdiction under the Foreign Sovereign Immunities Act." 508 F. Supp. at 1362. While Congress might repeal the FSIA, "the President may not do so by Executive fiat." *Id.* at 1365.

To the extent that the IEEPA authorized the Executive actions, it found that Act unconstitutional.

On February 24, 1981, the President issued Executive Order 12294, which purports to suspend indefinitely all claims which may be presented to the proposed Iran-United States Claims Tribunal "and all claims for equitable or other judicial relief in connection with such claims" and to provide that "[d]uring the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States."

On the same date, the Department of the Treasury issued related regulations. The regulations implement the suspension of legal proceedings set forth in Executive Order 12294, 31 C.F.R. § 535.222(a), and, repeating the language of Executive Order 12279, prohibit all persons from "exercising any right, power or privilege, whether by Court order or otherwise," as to certain property. 31 C.F.R. § 535.218(c). It is this language which purportedly negates EDS's Order of Attachment because it forbids EDS to exercise any of its rights under that Order.[5]

---

[5]A May 8, 1981, amendment to the Iranian Assets Control Regulations, the Federal Defendants contend, indicates that EDS's pre-freeze attachment is not subject to the requirement that funds be transferred on July 19, 1981. 46 Fed. Reg. 26477 (May 13, 1981). Whether or not the funds subject to EDS's Order of Attachment are transferred abroad, EDS is barred from exercising its rights under the Order, and its Order of Attachment is just as effectively negated as are those where funds are transferred abroad. The constitutional issues in either case are the same: the Executive, acting alone, is interposing itself in judicial proceedings to negate an attachment. The Iranian Defendants, for their part contend that the Declarations require that EDS's Order of Attachment be "nullified". Supplemental Statement and Brief in Fifth Circuit at 8 n.3, Appendix at A-71. Moreover, while the Regulations may not require such a transfer, neither do they bar one, and in the case of any such transfer, 31 C.F.R. § 535.219 purports to immunize the transferor from liability.

On March 24, 1981, the Federal Defendants filed their Notice of Appeal with respect to the Preliminary Injunction. Thereafter, in an appeal brief filed in both Fifth Circuit appeals they not only argued that Executive Order 12279 was constitutional as applied to EDS, but also argued that Executive Order 12294 and certain amendments to the Iranian Assets Control Regulations, 31 C.F.R. §§ 535.213(a), 535.218 and 535.222 (a) (the "Regulations"), promulgated after the Preliminary Injunction, required termination of EDS's litigation.[6]

Reasons for Granting the Writ

This case squarely presents an historic clash among the three co-equal branches of our Government. In 1976, Congress enacted the FSIA which explicitly granted the federal Judiciary jurisdiction over certain commercial claims against foreign states. Exercising its power to determine the jurisdiction of the federal courts and to legislate regarding foreign commerce, Congress intended that the resolution of such claims be uninfluenced by international politics and foreign policy and be committed to resolution by the Judici-

---

[6]The appeals of the Iranian Defendants and the Federal Defendants were joined for oral argument and were argued on April 20, 1981. After the argument, the Fifth Circuit permitted the Iranian Defendants to file a Supplemental Statement and Brief where they contended the Executive Orders and the Regulations ousted the federal courts of jurisdiction and nullified EDS's Final Judgment and Order of Attachment, thus raising all the constitutional issues previously raised by the Federal Defendants.

All these issues have also been raised by the Federal Defendants and the Iranian Defendants in the District Court on the Federal Defendants' and EDS's cross-motions for summary judgment in the Supplementary Proceeding. Those motions were argued on April 24, 1981, and the parties anticipate a decision at any moment. If the District Court should rule as it did in issuing its Preliminary Injunction, holding the IEEPA unconstitutional, a direct appeal of that decision will lie to this court under 28 U.S.C. § 1252.

ary. EDS invoked that jurisdiction and over a period of two years carried its contract claim to a Final Judgment of $19 million secured by a pre-judgment Order of Attachment.

The Executive Branch, under the tremendous pressure of the Iranian hostage crisis, has committed itself to a course which is irreconcilable with the constitutional principle of separation of powers. It asserts the power to nullify the judgments and attachments of federal courts and to oust those courts of their Congressionally-conferred jurisdiction. This case clearly and sharply presents the conflict between claimed Executive power over foreign affairs and the central functions of the Judiciary pursuant to Congressional enactment, a conflict which only this Court can resolve.

The Executive is here trying to do what no Executive, acting alone, has ever tried to do in the history of the Republic: oust federal courts of Congressionally-conferred jurisdiction and nullify a final judgment and an attachment rendered by the federal courts. The Executive action here is a radical and wholly unprecedented departure from prior Executive practice. To permit the Executive action here involved to stand, this Court would have to authorize a major redistribution of power among the three Branches of our tripartite form of Government, altering a balance and separation of powers among the Branches which has endured for two hundred years. The powers here sought to be exercised by the Executive were not accorded to it by the Constitution, and, whatever the exigencies that led to the present Executive action, this Court cannot permit that action to impinge upon legislative and judicial powers.

The Executive Orders and Regulations that arise out of the Declarations raise a constitutional issue of the first magnitude and of first impression: whether the Execu-

tive can interpose itself into an area where Congress has legislated that the Judiciary shall act and the Judiciary has acted. Like *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this case requires this Court to set limits on the naked power of the Executive and to examine the delicate equilibrium that our Constitution creates among the three branches of our government. Like *Youngstown Sheet and Tube Co.*, this case requires the Court's immediate attention; for these issues must be settled by July 19, 1981, the date on which the Declarations state that the Executive will transfer abroad approximately four billion dollars in Iranian assets located in this country.

The need for a definitive legal ruling by this Court has perhaps been best expressed by Judge Caffrey of the District of Massachusetts in *Chas. T. Main Int'l, Inc. v. United States*, Civ. Action No. 81-315-C, slip op. at 5 (D. Mass. March 17, 1981), *aff'd*, Civil Action No. 81-1187 (1st Cir. May 22, 1981), reported in Iranian Assets Litigation Reporter at 2688, 2689-2690 (March 20, 1981):

> It takes no great amount of scholarship to realize that with several hundred cases pending against the government of Iran and other Iranian governmental, quasi-governmental and possibly private agencies, the final words resolving this question will come from the United States Supreme Court. An expedited decision on the issue of Presidential authority is of considerable importance on these unusual facts, both to the United States Government in its conduct of foreign relations, and to the plaintiff Chas. T. Main International, particularly in light of the need for a definitive ruling by July 19, 1981, the date by which all Iranian funds are to be transferred pursuant to the Executive Orders. If a clear ruling is not forthcoming, the United States may be viewed as breaching its agreement, and Chas. T. Main International may be prejudiced if its claims to the

> tribunal are delayed. The need for such a ruling outweighs any purpose that might be served if this judge, who is but one of the more than twenty District judges before whom these several hundred cases are pending, attempted to write the definitive constitutional exposition of the extent of the powers of an American President in conducting negotiations with a foreign government of the complexity involved herein.

It is clear that the lower federal courts premised their decisions on the notion that this Court would render the definitive legal ruling on the issues presented here.[7]

The Executive is so doubtful about its constitutional power to encroach upon areas that the Congress has designated for judicial resolution that it has stated will not act to enforce its Executive Orders and Regulations until it has such a "definitive legal ruling." 31 C.F.R. § 535.221(b). A definitive ruling, however, can only come from this Court. While there have been several rulings in lower courts, their opinions have been confused and divided; in no sense can those courts be said to speak with a single voice. Two Circuit Courts have acted, but the opinion of the First Circuit is badly split on essential issues, and the District of Columbia Circuit has yet to publish its opinion.

An examination of the few decided cases shows a chaotic disarray of conflicting results regarding the critical issues in

---

[7]The District of Columbia Circuit stated in its judgment that the reason for issuing a judgment without an opinion, which was to follow "at a later date," was that the United States had

> represented to this Court that it may be considered to be in default of its obligations to the Islamic Republic of Iran under the executive agreements of January 19, 1981, should the issues it raises not be resolved definitely by July 19, 1981, and that any petition for certiorari to the Supreme Court which may be necessary to this end must be filed by the end of May.

Judgment in *American International Group, Inc. v. Islamic Republic of Iran*, Civil Action No. 79-3298 (D.C.Cir. May 22, 1981).

EDS's case. The first issue which presents itself is whether any statutes either authorize or forbid the Executive's actions. The primary statute the defendants have relied on as authorizing the Executive's action is the IEEPA.[8] That Act was intended to contract the broad peacetime powers previously exercised by the Executive under section five of the Trading with the Enemy Act, 50 U.S.C. App. § 5 ("TWEA");[9] and the legislative history of the IEEPA indicates that Congress intended to grant only limited

---

[8]The Executive Orders cite (but the Government does not seriously urge) three statutes in addition to the IEEPA as authorizing the Executive action. None of the other three provides even a plausible semblance of authority for the Executive Orders and Regulations, nor has any court considered them to authorize the Executive's actions. The Hostage Release Act, 22 U.S.C. § 1732, is an 1868 statute which has never before been used for such a purpose. The statute, which permits the President, in the case of American citizens being taken hostage, to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effect [their] release." The authority conferred by this statute plainly pertains only to Executive action through diplomatic and consular means, *Worthy v. Herter*, 270 F2d 905, 910 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959), and does not apply to domestic actions. *Narenji v. Civiletti*, 481 F. Supp. 1132, 1141 n.7 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). The other two provisions cited, 3 U.S.C. § 301 and 50 U.S.C. § 1631, provide no support. The former authorizes the President to delegate certain functions to department heads while the latter simply requires the President to report certain uses of emergency authority to the Congress.

[9]Congress in 1977 passed the IEEPA to replace the peacetime authority for Presidential action in emergencies that previously existed in Section 5(b) of the TWEA — a statute criticized by Congress for having "become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without Congressional review." H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) ("IEEPA House Report"). To replace this discredited use of power under the TWEA, the IEEPA substituted a "new set of international economic powers, more restricted than those available during time of war . . ." *Id.* at 7.

powers.[10] The District Court in this case recognized that the IEEPA never "intended to limit or nullify the jurisdiction of Article III Courts." 508 F. Supp. at 1361. Other courts have expressed differing views regarding the IEEPA. *Security Pacific National Bank v. The Government and State of Iran*, Nos. CV 79-4661-RJK (Gx), CV 79-4875-RJK (Px), CV 80-0524-RJK (Kx) (C.D. Cal. April 30, 1981), for example, held that the IEEPA authorized both the vacation of post-freeze attachments and the dismissal of pending claims. The only other opinion extensively discussing the scope of the IEEPA, *Chas. T. Main Int'l, Inc. v. United States*, Civil Action No. 81-1187 (1st Cir. May 22, 1981), is a sharply divided opinion. Two judges found that the IEEPA did not authorize Executive Order 12294's suspension of the jurisdiction of federal courts over pending suits; the third and concurring judge found that it did.[11] Thus, this essential issue of whether the Executive's action are statutorily authorized is completely unresolved.

---

[10]For example, Rep. Jonathan Bingham, one of the sponsors of the IEEPA, explained that the legislation would empower the President to "freeze but not seize" the assets of foreign entities in international emergencies. Markup of H.R. 7738 Before the House Committee on International Relations, 95th Cong., 1st Sess. 4 (1977). Comparison with its predecessor, the TWEA, further shows the limited nature of the IEEPA powers. For example, TWEA § 9 provides explicit judicial remedies to protect the interests of United States nationals in seized property. That the IEEPA does not contain such remedies is strong evidence that such seizure or transfer out of the United States, at least where United States nationals have an interest in the property, was not contemplated under the IEEPA.

[11]There is clearly no power granted to the Executive by the IEEPA to abrogate EDS's Final Judgment against the Iranian Defendants as the Executive attempts to do in Executive Order 12294. The IEEPA powers only extend to "property in which [a] foreign country . . . has [an] interest." The Iranian Defendants have no property interest in EDS's Final Judgment, which is the sole property of EDS. *Accord, Chas. T. Main, Int'l, supra*, slip. op. at 14-15 n.13; *contra, id.*, concurring slip op. 1-2.

The impact of the FSIA on the power of the Executive is another important issue. Congress's intent in enacting the FSIA was to remove certain commercial claims against foreign sovereigns from the highly political arena of the Executive's foreign affairs power, to vest their resolution in the courts,[12] and to create for the first time a dependable, effective method for claimants to litigate directly against foreign sovereigns, a method not subject to the whims of the State Department or emasculated by a lack of procedural resources.[13] The District Court in EDS's case perceived that

---

[12]Congress stated its intention that immunity decisions be made "exclusively by the courts and not by a foreign affairs agency" in order to "reduc[e] the foreign affairs implications of immunity determinations and [to] assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that ensure due process." H. Rep. No. 94-1487, 93d Cong., 2d Sess. at 7 (1976) ("FSIA House Report"). As stated by Bruno Ristau, the Chief of the Foreign Litigation Unit of the Department of Justice in support of the 1973 version of the FSIA,

> a dispute arising out of a commercial activity ought to be divorced from any diplomatic overtones whatever and should be settled through the ordinary processes of law.

Hearing on H.R. 3483 before the House Comm. on the Judiciary, Subcommittee on Claims & Gov. Rel., 93d Cong., 1st Sess. at 30 (June 7, 1973). The FSIA was intended to insure that one who deals with a foreign state could be secure that "his legal dispute with [the] foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State." FSIA House Report at 9. Under the Executive Orders and Regulations the Executive is attempting to intervene in this litigation, in effect, to give the Iranian Defendants immunity from United States court jurisdiction in a manner clearly forbidden by the FSIA.

[13]*See* 122 Cong. Rec. 33532 (Sept. 29, 1976) (Rep. Danielson); Hearings on H.R. 11315 before House Comm. on Judiciary, Subcomm. on Admin. Law and Govt. Rels., June 2 and 4, 1976, ("FSIA House Hearings"), at 24-25, 27, 29 (Monroe Leigh, Legal Adviser State Dept.); at 30, 31 (Bruno Ristau, Justice Dept.) (executive branch intercession "has caused foreign relations problems for the executive branch," and the bill would "depoliticize the area"). As the Legal Advisor stated: "[W]hen the foreign state enters the marketplace or when it functions as a private party, there is no

Continued on next page.

no power of the Executive could constitutionally interfere with Congress's commitment to the federal courts of the resolution of those claims. The District Court in *Security Pacific National Bank, supra,* held that the pre-judgment attachment in that case was invalid without regard to the Executive Orders and Regulations, thus making "unnecessary a consideration of the difficult issue of whether a Presidential settlement such as this would override valid attachments obtained pursuant to the FSIA." Slip op. at 52 n. 24. Other courts, however, have gone off on idiosyncratic tangents in dealing with the FSIA. In *Chas. T. Main Int'l, Inc., supra,* the First Circuit majority narrowly construed the FSIA and held that it "was directed toward a single topic — sovereign immunity." Slip op. at 20. The Court in *Unidyne Corp. v. Government of Iran,* Civil Action No. 80-1029-A (E.D. Va. March 30, 1981), went so far as to hold, quite erroneously, that the FSIA "is not an independent grant of jurisdiction to the courts that was not had before," despite the fact that 28 U.S.C. § 1330 is, on its face, a grant of personal jurisdiction over foreign states, not previously available in federal courts.[14] Thus, the question of whether the

---

Continued from previous page.

justification in modern international law for allowing the foreign state to avoid the economic costs of the agreement which it may breach . . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." *Id.* at 27. The Executive endorsed the effort to "facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation" by committing these issues exclusively to the Judiciary. Joint Letter from Depts of State and Justice, FSIA House Report at 44-45.

[14]Moreover, Congress intended that executive accords such as the hostage agreements would not affect jurisdiction under the FSIA. The jurisdiction of the federal courts that the FSIA grants over foreign sovereigns is subject to treaties, whenever ratified, FSIA House Report at 10, but only to "existing international agreements to which the United States is a *party at the time of enactment of this*

Continued on next page.

FSIA has given to the Judiciary alone the power to resolve commercial claims against foreign sovereigns is likewise unresolved.

The Federal Defendants have increasingly come to rely not on the authorization of the IEEPA, but on the President's alleged inherent power to "settle" claims as the primary authority for the Executive Orders and Regulations. The concurring First Circuit Judge in *Chas. T. Main Int'l* declined to attempt to determine the scope of the Executive's inherent Article II power to settle suits against foreign nationals, "because that question is more difficult than the court [majority] suggests." Concurring slip op. at 1. The other two First Circuit judges in *Chas. T. Main Int'l* cautiously held that the Executive could settle a claim that had gone no further in the courts than the filing of a complaint — and thus was unlike EDS's case where its claim has been merged in a Final Judgment — but went on to express their deep reservations regarding the breadth of such a power:

> We need not and do not hold that the executive possesses plenary power to settle claims, even as against foreign governmental entities. It may be that much of this area is within that 'zone of twilight in which [the President]

Continued from previous page.

Act." 28 U.S.C. §§ 1604, 1609 (emphasis added). Significantly, an earlier draft of the bill would have extended the exemption in §§ 1604 and 1609 to future agreements, but the House of Representatives eliminated that extension. FSIA House Report at 10. The House reasoned that any future international agreements regarding jurisdiction over foreign sovereigns would receive the specific Congressional approval requisite for a treaty before it could override the FSIA by virtue of Article VI of the Constitution. It is apparent therefore that Congress understood that an executive agreement lacking specific Congressional approval could not affect the FSIA.

> and Congress may have concurrent authority.' *Youngstown, supra*, 343 U.S. at 637. The sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary.

Slip op. at 22. The concurring judge specifically noted the lack of precedent for the Executive's position; he observed that the cited cases almost exclusively involved claims by Americans against foreign governments, which, under traditional principles of international law, could not be asserted by individuals, but only by a nation. In this respect, the concurring judge correctly noted that, in this century, "international law has changed, and governments acting in a commercial capacity now tend to be treated like private citizens before the courts." Concurring slip op. at 3. This heterogeneous decision not only fails to dispose of the constitutional issues regarding the scope of the Executive's Article II powers, but vividly demonstrates how unsettled those issues now are.

In general the lower federal courts have recognized that the Executive may not oust the federal courts of jurisdiction; that it is the role of Congress to grant that jurisdiction and of the courts themselves to interpret that grant. The District Court in this case found that the Executive's action was "constitutionally invalid insofar as it attempts or purports to countermand or nullify valid exercises of the judicial power reflected by the judgment of this Court and attachment order of the District Court for the Southern District of New York." 508 F. Supp. at 1363. Other courts have declined to grant the Executive's requests ousting them of jurisdiction. The District Court in *Unidyne, supra*, refused to stay pending litigation, despite the contrary requirement in the Execu-

tive Orders and Regulations. The District Court in *Dresser, Inc. v. The Islamic Republic of Iran*, Civil Action No. CA 80-1535-H (N.D. Tex. May 21, 1981), refused to dismiss the plaintiffs' complaint on the basis of the Declarations. The United States Court of Appeals for the District of Columbia Circuit refused to vacate a partial summary judgment against Iran in *American International Group, Inc., v. Islamic Republic of Iran*, Civil Action No. 79-3298 (D.C. Cir. May 22, 1981), despite the United States' request that it do so. *Chas. T. Main Int'l*, on the other hand, found that since the Executive had "settled" claims in the Declarations, there was no ousting of jurisdiction. This facile wordplay is hardly the "definitive" resolution that constitutional issues of this importance merit.

Absent a definitive ruling by this Court by July 19, 1981, the Executive will be directing custodians of attached funds to surrender those funds contrary to those attachments, thus ordering these custodians to violate court orders while promising immunity in return in the face of these conflicting and chaotic opinions. The position taken by the District Court in *Security Pacific National Bank, supra*, points up the inevitable clash between the Executive and the Judiciary which will occur if this Court does not resolve the Constitutional issues presented in this case. That District Court held that the Executive could take actions which had the effect of vacating post-freeze attachments or settling claims, but those actions would not be effective without the Court's independent judgment on the validity of those actions. The Executive "may not nullify the attachments independently of this Court's order." Slip Op. at 37. This would imply that the purported immunity given in 31 CFR § 535.219 to the parties transferring attached assets to the Secretary of the Treasury will be ineffective for attached funds if the court

issuing the attachment has not previously passed on the validity of the nullification. If this Court does not resolve the constitutional issues in this case, custodians will have to choose between penalties for disobeying the Iranian Assets Control Regulations and penalties for disobeying their attachment orders.

This Court has never addressed the constitutional issues presented by this unprecedent exercise of Executive power; the questions involved are completely unsettled. The federal courts supporting the exercise of power with respect to other litigants against Iran have relied in large part on two pre-FSIA cases, *The Schooner Peggy*, 5. U.S. (1 Cranch) 103 (1801), and *United States v. Pink*, 315 U.S. 203 (1942), but neither case dealt with the exercise of Executive power here involved.

The Schooner Peggy is irrelevant to the issues of Executive power in this case. That case involved a treaty, not the bare Executive action involved here. Most important, in *The Schooner Peggy*, "no doubt [as to the constitutionality of the treaty] ha[d] been expressed" — the precise and sole issue here involved. The Court noted that if the treaty had been unconstitutional "its obligation [must have been] denied." 5 U.S. at 110.[15]

United States v. Pink contains no holding whatever on the issues presented here.[16] Indeed, the fact situation there

---

[15]The claims "settled" in *The Schooner Peggy*, moreover, were not commercial claims; it was a prize case, and the only claimants were the United States itself and the officers and crew of "a public armed vessel" of the United States, 5 U.S. at 105; the only "rights" arose from the performance of military service in war time.

[16]*Pink* arose out of the Executive's recognition of the USSR in 1933. 315 U.S. at 211. During a fifteen-year period of non-recognition, Russian nationalizations had given rise to many American

Continued on next page.

was the antithesis of that here present. *Pink* involved an assignment of property — and nothing more. No final judgments or attachments or even pending claims in federal courts were vacated or terminated by the assignment; in fact, judgments later became "binding" on the Foreign Claims Settlement Commission that resolved such claims, were given priority over unadjudicated claims and were paid in full. Claimants holding attachments only were also given preference and the Commission's awards on such secured claims were paid in full as well. 22 U.S.C. §§ 1641d, 1641l; *see also*, H. Rep. No. 624, 84th Cong., 1st Sess., reprinted in [1955] U.S. Code Cong. & Ad. News 2745, 2750.[17] Two

---

Continued from previous page.

claims, and lawsuits had tied up Russian assets in this country. "Preparatory to a final settlement of the claims and counterclaims" between the USSR and the United States "and the claims of their nationals" — a final settlement which never occurred, see H. Rep. No. 624, 84th Cong., 1st Sess. (1955), reprinted in [1955] U.S. Code Cong. & Ad. News 2745, 2747; see also, *United States v. Belmont*, 301 U.S. 324, 336 (1937) (Stone, J., concurring) — the USSR transferred to the United States its interests in these assets under the Litvinov Assignment. That Assignment did not purport to settle claims or suits pending in United States courts against the USSR by Americans, nor final judgments obtained against it. To the contrary, the Soviet Union agreed not to make any claim or challenge with respect to "judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest." *Pink*, 315 U.S. at 212.

The lower federal courts also relied on *United States v. Belmont*, 301 U.S. 324 (1937). In *Belmont*, the Court upheld the Litvinov Assignment as against a mere custodian of Soviet assets, but specifically left open the "status of adverse claims" with respect to those assets and invited holders of such claims to intervene to determine their rights. 301 U.S. at 333.

[17]Furthermore, the Court's decision in *Pink* turned on the improper refusal of the New York Court of Appeals to give extraterritorial effect to the USSR nationalization of the assets in

Continued on next page.

judges of the First Circuit in *Chas. T. Main Int'l, Inc.*, slip. op. at 19, n. 18, fully recognized that "the only issue directly presented in *Pink* was whether the United States, as assignee, could recover the assets of a nationalized branch of a Russian corporation in derogation of the rights of the corporation's foreign creditors," but felt that the "rationale" of *Pink* "would seem applicable." These judges thus recognized that there was no direct precedent on which they could rely. Only a decision by this Court in this case can provide such a precedent.

EDS's case presents in the clearest and sharpest fashion the constitutional defects in the unprecedented exercise of Executive power embodied in the Executive Orders and Regulations. This Court must grant certiorari on an expedited basis to prevent the Executive from flouting the restrictions the Constitution imposes on it by sending abroad, next month, billions of dollars which the Constitution and laws of this country have put beyond its grasp.

Continued from previous page.
controversy, a refusal which, if correct, would have been "decisive of the controversy." 315 U.S. at 217. The Supreme Court found, however, that, by reason of the Supremacy Clause, the New York Courts were bound to give effect to the Soviet nationalization. As the Court of Appeals for the District of Columbia has observed, "the sole presidential decision that was given conclusive force [in *Pink*] concerned who was to be considered the lawful sovereign of the foreign power." *Zweibon v. Mitchell*, 516 F.2d 594, 620 (D.C. Cir. 1974) (en banc), *cert. denied*, 425 U.S. 944 (1976). The Controversy in *Pink* never concerned the jurisdiction of federal courts or nullification of a final judgment — the issues here — but only the proper effect to be given to an assignment of assets subject to a foreign nationalization.

Conclusion

This Court should grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit before judgment and should affirm the decision of the District Court.

Respectfully submitted,

Thomas W. Luce, III
Counsel of Record
M. David Bryant, Jr.
Eugene Zemp DuBose

HUGHES & HILL
1000 Mercantile Dallas Building
Dallas, Texas 75201

Of Counsel:

Monroe Leigh
Michael Sandler

STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036